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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

GRANT O. ADAMS, et al.,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION and UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR WRIT OF CERTIORARI

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May 20, 2009

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QUESTIONS PRESENTED FOR REVIEW

Whether a new statute can be applied to dismiss dozens of petitions without consideration of the alleged unconstitutionality or invalidity of the statute.

Whether 49 U.S.C. § 46110(a) strips a court of the power to consider the unconstitutionality of a statute before applying it.

Whether the Fairness for Experienced Pilots Act 49 U.S.C. § 44729(e)(2) implicitly removes the authority of the Federal Aviation Administration to grant exemptions to senior pilots to allow them to fly aircraft without the loss of status and seniority.

Whether a court can dismiss petitions on the grounds that new legislation bars exemptions without addressing alternative interpretations or the uncontested existence of dozens of post-enactment exemptions granted other pilots.

PARTIES TO THE PROCEEDING

Petitioners are as follows:

Grant O. Adams; Jose R. Arias; Robert H. Attaway; Stephen L. Avery; Abe R. Balderamma; Michael W. Ballard; John W. Bernick; Terrence J. Brady; James G. Bumford; James A. Cantrell III; Stephen R. Carignan; Gene H. Carswell; Gary J. Casperson; Charles F. Chapas; Jack W. Chapman; Carl C. Chappell Jr.; Kenneth C. Ciszek; Gordon M. Cohen; Terry L. Collette; Richard L. Collier; Dennis M. Cox; Bruce C. Davey; Francis van Cortland De Peyster; Robert W. Dowgialo; George V. Emory; E. Allan Englehardt; Woodrow W. Friend Jr.; Anthony Gentile; Robert P. Gibson; David J. Graham; Susan W. Harrison; Christopher Hartle; Scott Hein; Charles E. Henry; Richard A. Hinnenkamp; James D. Hodgson; Herbert S. Holland III; Charles R. Hosmer; Timothy J. Houghton; DeLloyd J. Jacobson; Glen J. Kane; Donald L. Krstich; Richard F. Land; Michael J. Lierley; Gerard D. Lionetti; JoBeth G. Lynch; Raymond Lysen; William B. Mann Jr.; Steven B. McBride; David M. McCord; Keith L. McCormick; James R. McGrath; Irby R. McNerlin; James W. McStay; James Mehew; David B. Mickle; James Monbeck; James Montalbano; Richard C. Morgan; Errol Mullins; Charles R. Musick; Earl H. Myers Jr.; Lloyd L. Nelson; Michael E. Newton; Ronald Nielson; James W. Owens; Tom N. Park Jr.; Michael J. Peet; David E. Pelham; Irwin Pentland, Donald N. Persky; Bertil R. Peterson; Dennis C. Pettet; Robert L. Reusche II; Robert C. Ritchie; Paul J. Rodgers Jr.; Daniel R. Roy; Wayne G. Savage; Harold S. Schichtel; Frank T. Schott; Lorenzo M. Scin; Gary C. Shepard; Kenneth P. Shrum; Bradley V. Smith; Lyle M. Speace; Dale A. Steele; Norman R.

Stocker; William W. Struthers; James P. Sullivan; James R. Sweller; Lewis J. Tetlow III; Mark D. Thomas; Larry I. Tubor; Akeary G. Vick; George J. Walters; Henry J. Weiland; James Woody; and Steven P. Zandstra.

Respondents are the Federal Aviation Administration and the United States Department of Transportation.

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PETITION FOR A WRIT OF CERTIORARI

Grant O. Adams and the other senior pilots respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (App. A) is reported at 550 F.3d 1174 (D.C. Cir. 2008).

JURISDICTION

The court of appeals entered its judgment on December 19, 2008. The Petitioners filed a timely petition for rehearing en banc on February 1, 2009, which was denied on February 20, 2009. (App. D) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) as specified under 49 U.S.C. § 46110(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states that "[n]o person shall be . . . be

deprived of life, liberty, or property, without due process of law."

The Fairness for Experienced Pilots Act 49 U.S.C. § 44729(e)(1):

> 1) NONRETROACTIVITY- No person who has attained 60 years of age before the date of enactment of this section may serve as a pilot for an air carrier engaged in covered operations unless--
>
> (A) such person is in the employment of that air carrier in such operations on such date of enactment as a required flight deck crew member; or
>
> (B) such person is newly hired by an air carrier as a pilot on or after such date of enactment without credit for prior seniority or prior longevity for benefits or other terms related to length of service prior to the date of rehire under any labor agreement or employment policies of the air carrier.

The Fairness for Experienced Pilots Act 49 U.S.C. § 44729(e)(2):

> (2) PROTECTION FOR COMPLIANCE- An action taken in conformance with this section, taken in conformance with a regulation issued to carry out this section, or taken prior to the date of enactment of this section in conformance with section 121.383(c) . . . may not serve as a basis for liability or relief in a proceeding,

> brought under any employment law or regulation, before any court or agency of the United States or of any State or locality.

The federal code at 49 U.S.C. § 46110(a) states in pertinent part:

> (a) Filing and Venue. - Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation safety duties and powers designated to be carried out by the Administrator) under this part may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. . . .
>
> Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

STATEMENT OF THE CASE

The instant case was filed directly with the appellate court, pursuant to 49 U.S.C. § 46110(a), challenging the orders of the Federal Aviation Administration (FAA) after it denied exemptions from the "Age 60 Rule." Under 14 C.F.R. § 121.383(c), pilots were barred from operating certain commercial aircraft after their 60th birthday.

For years, the senior pilots in this case have sought judicial review and relief before both the district court and appellate court to protect their livelihoods from discriminatory and arbitrary actions by the FAA. They began this odyssey by challenging the Age 60 Rule before the United States District Court for the District of Columbia in 2007.[1] After lengthy briefing and hearings on the filing, the District Court Judge John Bates strongly encouraged the Petitioners to re-file with the appellate court challenging the FAA orders with the United States Court of Appeals for the District of Columbia. After years of appellate litigation, however, the panel directed the Petitioners back to the district court for a new filing. There was no reasoned basis offered by the D.C. Circuit, which refused to address the legal and factual challenges raised by the Petitioners to the use of a new law to dismiss the case. Thus, these pilots have been denied any substantive explanation by two branches of

[1] This action, *Tetlow v. Blakely* [sic], Case No. 1:07-cv-00602 (JDB), was voluntarily withdrawn without prejudice and the pilots proceeded with the petition appeal with new counsel.

government for the denial of their status, salaries, and seniority based on their age.

The instant case originated with Petitions for Review by senior pilots who challenged orders from the FAA denying exemptions from the Age 60 Rule without any consideration of their abilities, health, or experience. Since 1959, the FAA has barred pilots from flying commercial aircraft based solely on age. The FAA promulgated the Age 60 Rule, barring any pilot who "has reached his 60th birthday." 14 C.F.R. § 121.383(c) (2008).[2] However, pilots are allowed an exemption if they can show "why granting the exemption would not adversely affect safety" or how it would "provide a level of safety equal to that provided by the rule from which you seek the exemption." 14 C.F.R. § 11.81(e) (2008). For many years, the FAA carried out the plain meaning of the exemption standard and issued individual exemptions based on showings that pilots are not a danger to air safety due to their age. It also allowed commuter pilots over the age 60 to fly. *See Yetman v. Garvey*, 261 F.3d 664, 668 (7th Cir. 2001). However, in 1995, the FAA suddenly announced a categorical rejection of exemptions. *See* 60 Fed. Reg. 65,980 (1995).

The Age 60 Rule put the United States in direct conflict with international standards and agreements, including standards of the International Civil Aviation

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[2] The rule stated in full: "No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday." 14 C.F.R. § 121.383(c).

Organization's (ICAO), which uses 65 as the age limit for air carrier pilots-in-command. This international standard became effective on November 23, 2006, and created a bizarre anomaly. A pilot in the United States, therefore, could be fired by an airline under the Age 60 Rule and immediately fly into the same airport as a pilot aboard a foreign carrier.

There has been no research establishing a basis for the Age 60 Rule or explaining how terminating pilots at age 60 serves the interest of air safety. To the contrary, in a November 26, 2006 letter, the Equal Employment Opportunity Commission (EEOC) notified the FAA that it had concluded over two decades earlier that age was not a bona fide occupational qualification (BFOQ) for pilots. Letter of Naomi C. Earp, Chair, EEOC, to the FAA, November 15, 2006 (finding that "[t]he Age 60 Rule runs counter to the narrow scope of the BFOQ defense and the fact-specific, case-by-case analysis it requires."). Moreover, the FAA itself admitted that the rule was archaic and unnecessary. On January 30, 2007, the FAA administrator Marion Blakey spoke on the lack of support for the Age 60 Rule at the National Press Club:

> It's time to close the book on Age 60. The retirement age for airline pilots needs to be raised. So, the FAA will propose a new rule – to allow pilots to fly until they are 65. . . .
>
> When airlines back in the day [the 1950s] were forcing pilots to retire, the union took legal action. Arbitrators ruled for the pilots each time. . . . American Airlines prevailed on the FAA for a rule. . . . The man in charge at

> American, C.R. Smith, wrote to Pete Quesada, the administrator at the time. . . . Less than four months later, the Federal Aviation Administration issued a proposed rule. . . . When you're 60, your career as an airline pilot would be over.
>
> It's now a different day and age. The issues of experience, harmonization – and let's face it – equity – all have to be considered.

See National Press Club Luncheon Address by Federal Aviation Administrator Marion Blakey, Fed. News Service, January 30, 2007; *see also* Paul Beebe, *Pilots' Age Rule Change Stirs Dissent*, Salt Lake Trib., March 10, 2007, at 5. Despite such frank admissions, the FAA continued to fight efforts to challenge the Age 60 Rule and continued to deny exemptions to the rule for individual pilots. *See, e.g., Prof'l Pilots Fed'n v. FAA*, 118 F.3d 758 (D.C. Cir. 1997).

Petitioners filed dozens of identical petitions seeking relief from FAA orders over the course of two years.[3] Petitioners maintain that these orders violate the United States Constitution and various federal statutes.

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[3] On June 1, 2007 (No. 07-1180), a petition for dozens of pilots was filed. This petition was followed by identical claims on June 8, 2007 (No. 07-1194), June 22, 2007 (No. 07-1126), August 16, 2007 (No. 07-1326), September 14, 2007 (No. 07-1366), October 1, 2007 (No. 07-1390), November 2, 2007 (No. 07-1447), December 14, 2007 (No. 07-1507), December 19, 2007 (07-1524), and January 22, 2008 (08-1023). All ten petitions have been consolidated by order of the court.

During the pendency of this litigation, Congress passed the Fair Treatment for Experienced Pilots Act, Pub. L. No. 110-135, 121 Stat. 1450 (2007) (hereinafter "the Act"), which President Bush signed on December 13, 2007. With this law, the FAA now accepts that the government has made a "safety determination that, generally speaking, pilots can serve up to age 65 in part 121 operations."[4] Joint Pet. Br. Addendum C (Question #8) (March 13, 2008 FAA statement). The petitioners were issued identical letters of denial of reconsideration by the FAA that stated that the agency interpreted the Act as barring any consideration of exemptions for senior pilots. (App. B).

Despite its ironic title, the Fair Treatment for Experienced Pilots Act was enacted specifically to bar experienced pilots from being able to either fly or contest the denial of their seniority and benefits. The most experienced pilots are penalized on the sole basis of their age regardless of their individual capabilities, health, or experience. The new Age 60 Rule was inserted after a lobbying effort by the Air Line Pilots Association (ALPA), which first opposed the elimination of the Age 60 Rule and then secured provisions that penalized senior pilots who sought continued employment.[5] Under the Act, a pilot "who

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[4] Part 121 carriers were defined as those operating commercial aircrafts with a seating capacity of more than 30 passengers. See 14 C.F.R. § 121.1(a)(5)(ii) (1995). Part 121 was amended in 1995, and certificate holders subject to Part 121 are now addressed in 14 C.F.R. § 121.1(a).

[5] *See* DeWayne Wickham, *Rule Grounding Pilots at Age 60 Requires Overhaul*, USA Today, May 15, 2007, at 11A ("In the case of the Age 60 Rule, the political muscle is being applied by

has attained 60 years of age before the date of enactment" can only be rehired if the airline wipes out the pilot's prior seniority, status, and benefits. 49 U.S.C. § 44729(e)(1)(A)-(B). Thus, even if such a pilot has decades of experience and seniority, the only way that he or she can return to active status must be as a new hire absent an exemption. This not only results in a considerable loss of pay that can exceed hundreds of thousands of dollars per pilot, but practically denies the most experienced pilots access to large jets, or even an opportunity to fly at all.

The language was an open concession to the ALPA union, which drafted the provision and publicly claimed victory in having Rep. James Oberstar, Chairman of the House Transportation Committee to insert it into the legislation.[6] Congress did not articulate a public policy basis for negating years of seniority and benefits in favor of younger pilots. To

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the Air Line Pilots Association, an organization that represents more than 64,000 commercial pilots. A majority of ALPA's members oppose the rule change, which would make it harder for younger pilots to get the positions and favorable routes now held by more senior pilots."); *see also* Liz Feder, *NWA Pilots Oppose Oberstar on Retirement; Northwest and its ALPA Branch Sought to Keep it at Age 60*, Star Tribune, Dec. 12, 2007, at 1. The same organizations supported this legislation. *See http://www.alpa.org/DesktopModules/ALPA_Documents/ALPA_DocumentsView.aspx?itemid=11636&ModuleId=506&TabId=93 (statement of ALPA president).*

[6] In its public statements, ALPA heralded Transportation Committee Chairman Oberstar as "ALPA's man" and credited itself for the drafting and enactment of the language. J.A. at 268. *See http://www.seniorpilotscoalition.org/Oberstar%20March%2008.pdf.*

make matters more arbitrary, it is also uncontested that the FAA has allowed as many as two dozen pilots who reached 60 years before the enactment date to keep their seniority and benefits with Continental Airlines and possibly other airlines.[7]

On November 14, 2008, under an agreement with the government, the Petitioners' filed a new joint petition with an unopposed motion to consolidate the petitions. On December 19, 2008, the panel held that, regardless of the claimed facial invalidity of a statute, the court was required to apply the statute without review of such invalidity. (App. A) The opinion written by Judge Janice Rogers Brown notably did not address where in the statute Congress mandated that no petitions or exemptions would be allowed by the FAA. Nor did it address the fact that pilots who turned 60 before the enactment date were allowed exemptions from the law. The panel merely stated conclusorily that "[t]he Act, which expressly abrogates the Age 60 Rule, moots the petitions for review of the orders denying exemption from the Age 60 Rule." The entirety of basis for the holding was this single line – which dismissed dozens of petitions (pending for years) seeking to redress the loss of lifelong benefits and status. The panel stated without explanation that any "*initial* review" of the unconstitutionality or invalidity

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[7] A typical case involves Petitioner Herb Holland, a decorated Marine pilot from Vietnam, who was one of the most experienced pilots at US Airways. *See http://www.age60rule.com/docs/MEMORIAL%20DAY%20SHAME.pdf.* Holland missed the statutory date under the 2007 law by forty-three days. He lost his job, his benefits, and his status as a senior pilot. He is now living much of each month in Kazakhstan, where he is a pilot for Air Astana, away from his family living in the United States.

of the statute is expressly barred under 49 U.S.C. § 46110(a). *Adams*, 550 F.3d at 1176 (emphasis in original). On February 20, 2009, the United States Court of Appeals denied a petition for rehearing en banc. (App. D) This petition for a writ of certiorari followed.

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REASONS FOR GRANTING THE WRIT

The instant case presents a fundamental question: whether a court must refuse to consider the alleged unconstitutionality or invalidity of a statute used to dismiss dozens of pending individual petitions. The decision of the D.C. Circuit contradicts other circuits, which have reviewed the claims of invalidity of new laws before applying them to a given case. No other circuit has adopted the blanket rule that, regardless of any claim of invalidity or unconstitutionality, a statute must be applied to dismiss petitions without review under 49 U.S.C. § 46110(a).

The opinion in *Adams* imposes a sweeping and illogical rule for petitioners seeking review of agency orders and potentially for a much broader array of litigants. Under this rule, a law can be applied regardless of whether it directly contradicts the United States Constitution or prior rulings of this Court. The new rule conflicts with this Court's narrowly tailored rule in *Kremens v. Bartley*, 431 U.S. 119 (1977), where the Court mandated dismissal when relief has already been granted in the form of a legislative correction. Not only does this statute extinguish (rather than grant) relief, but the mootness rule was not intended to bar federal courts from reviewing facially

unconstitutional elements of a law. The D.C. Circuit suggests that a federal court has basically the same status as an agency where it must apply a federal statute without question or review. It cites the jurisdictional grant of 49 U.S.C. § 46110(a), but does not cite any language to support such a sweeping new rule. This provision, however, mandates a degree of deference to the agency ("supported by substantial evidence") on factual, not legal, issues related to the denial of petitions. A statutory interpretation stripping a court of the ability to review the validity of a statute is a radical departure from accepted rules of statutory construction.

The Fair Treatment for Experienced Pilots Act did not do away with the Age 60 Rule as much as it modified the rule. The modified Age 60 Rule does not change the fact that (absent an exemption) these pilots were denied their earned status, seniority, and salaries. Under the old rule, pilots who turned 60 were terminated from their positions and barred from flying the covered aircraft. Under the modified Age 60 Rule, the prior termination of pilots under the original rule is sustained and those pilots still lose their benefits and status. Absent an exemption, they are allowed to be rehired only as new pilots and there is no guarantee of rehire. Indeed, no petitioning pilots have been rehired under these conditions. The FAA still discriminates on the basis of age and, as shown with regard to dozens of Continental pilots granted exemptions, the FAA is still making exemptions under the rule. J.A. at 265. The lack of consistent application of this rule and the congressional rejection of the very basis for the denial of the petitions should be ample grounds to vacate the FAA orders. *See Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985)

("Elementary even-handedness requires that if all five factors must be met by one petitioner, then all five factors must be met by the next.").

The D.C. Circuit decision creates an unchallengeable power of the government to dismiss petitions without review and creates a new interpretation of provisions like 49 U.S.C. § 46110(a) for future cases. It denies Petitioners the most basic protections of due process: to have their claims resolved under valid and enforceable federal law.

I. THE D.C. CIRCUIT CONFLICTS WITH OTHER CIRCUITS IN REQUIRING THE APPLICATION OF A FEDERAL LAW WITHOUT CONSIDERING CHALLENGES TO ITS CONSTITUTIONALITY.

The *Adams* rule creates a conflict between the circuits on the role of a federal court in applying a new statute as the basis for dismissal on the grounds of mootness. *See* Sup. Ct. R. 10(a). The D.C. Circuit's rule maintains that a law like the Fair Treatment for Experienced Pilots Act can only be applied, not reviewed, by a federal court. It is a position that contradicts the most basic precepts of judicial review: a valid disposition of a case can only occur on the basis of valid binding legal rules. The court misapplied a basic principle of this Court that "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). However, when the reason for an alleged nullification of a claim is a statute, it is axiomatic that the burden

rests with the moving party to establish that the statute is both valid and enforceable.

While the enactment of a new statute in the middle of a petition appeal is rare,[8] courts routinely deal with new legislation in various areas. Other circuits have not followed such a rule requiring the blind and unquestioned application of a statute. For example, in *Zessar v. Keith,* 536 F.3d 788 (7th Cir. 2008), the plaintiffs challenged an election law that allowed the rejection of absentee ballots on unconstitutional grounds. After the district court found that the statute was unconstitutional, the legislature passed a new statute changing the election code. Rather than adopting the type of rule in *Adams*, the district court reviewed the constitutionality of the new legislation – ultimately denying a motion challenging the statute as unconstitutional. The Seventh Circuit also reviewed the application of the statute to the case. Having found that "the amended Code is not substantially similar to the challenged provisions of the pre-amendment Code," the Seventh Circuit dismissed that portion of the case that concerned criteria that were no longer applicable to the plaintiffs.[9] In comparison, the only substantive element changed under the Fair Treatment for Experienced Pilots Act was the theoretical possibility that the Petitioners could fly –

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[8] Indeed, Petitioners cannot find other cases with the identical case profile. However, it is the position of the Petitioners that a court's authority in addressing such challenges to new statutes is the same in petition and non-petition appeals.

[9] Notably, the Court could not reach the constitutionality of the later enactment because it was not part of the appeal with the case continuing on the district court. *Zessar,* 536 F.3d at 793.

even though the record is clear that the ALPA language practically guaranteed that no senior pilot would fly unless, after being rehired, the pilot was stripped of seniority and processed as a new pilot. The loss of status, seniority, and salaries remained the same before and after the modified Age 60 Rule. *Cf. Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) ("[J]urisdiction, properly acquired, may abate if the case becomes moot because . . . interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.").

The Eighth Circuit also addresses the constitutionality of new legislation before using such legislation as the basis to dismiss an action. In *Smithfield Foods, Inc. v. Miller,* 367 F.3d 1061, 1066 (8th Cir. 2004), the Iowa legislature amended the challenged law during the appeal. The Eighth Circuit ruled that the constitutionality of the new legislation would have to be established by the lower court and the claims could not be simply dismissed due to the amendment. *Smithfield Foods, Inc.*, 367 F.3d at 1066.

The Ninth Circuit also requires that a law be valid before allowing it to be used to dismiss an action. When such a law is introduced, the Ninth Circuit follows the rule that *"[i]f legislation passing constitutional muster* is enacted while a case is pending on appeal that makes it impossible for the court to grant any effectual relief, the appeal must be dismissed as moot." *Consejo De Desarrollo Economico De Mexicali v. United States*, 482 F.3d 1157, 1168 (9th

Cir. 2007) (emphasis added); *see also Paulson v. City of San Diego*, 475 F.3d 1047, 1048 (9th Cir. 2006).[10]

Likewise, the Eleventh Circuit considers constitutional challenges to a statute used to dismiss an action. In *Continental Ill. Corp. v. Lewis*, 827 F.2d 1517 (11th Cir. 1987), vacated in *Lewis v. Continental Bank*, 494 U.S. 472 (1990), the Eleventh Circuit addressed a case where the state passed a law during the pendency of the litigation to rectify a flaw in its banking laws. Despite the new law, the district court refused to dismiss the case as moot, noting that the new statute would not only have to be constitutional but make the violations incapable of repetition. *Lewis*, 494 U.S. 475-76. The Eleventh Circuit affirmed, "resting its determination that the case was not moot on the different ground that the supervening ban on new ISBs was unconstitutional." *Id.* at 476. Even after Congress intervened during the appellate litigation with a change in the Bank Holding Company Act of 1956, the Eleventh Circuit refused to reconsider its

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[10] The government's past reliance on the decision in *In re Bunker Ltd. P'ship*, 820 F.2d 308, 311 (9th Cir. 1987), is equally unavailing for the government. The Ninth Circuit did not rule in favor of the argument advanced by the Respondents. Rather, a claim was made for access to mining sites – a claim that was mooted when Congress expressly amended federal law to allow for such access. Both parties agreed that the statute made the specific matter moot (regarding the need for an initial agency determination). *Id.* at 311. There was no challenge to the constitutionality, validity, or materiality of the statute.

ruling, finding that the matter had to be fully addressed by the district court.[11]

In adopting a new sweeping rule, the lower court radically expanded its prior ruling in *Coalition of Airline Pilots Ass'ns v. FAA*, 370 F.3d 1184 (D.C. Cir. 2004). In that case, Congress legislatively corrected the due process problem that was the basis of the lawsuit and the Court found that it was a problem that would not be repeated. The lack of procedural rights in a regulation was challenged by various organizations. Congress, however, acted to supply the procedural protections. The Court found that Congress had "completely eradicated the effect of the alleged due process violations." *Id.* at 1190; *see also id.* at 1190-91 ("To begin with, the alleged constitutional violations are unlikely to recur . . . Congress has wholly cured the problem.").[12] The lower court missed the obvious distinction between the *Coalition of Airline*

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[11] While vacating the decision, the Supreme Court also declined to dismiss the case to allow the new statute to be fully addressed below. *Lewis*, 494 U.S. at 482.

[12] In dicta, referencing an ambiguous statement in oral arguments, the Court noted that "to the extent the Coalition is attacking [the statute], and not the rules themselves, we lack jurisdiction to consider such a claim." *Id.* at 1191. The reason for this conclusion appeared in the preceding line: "Emptied of legal effect, the challenged rules can neither chill protected speech nor punish certificate holders based on unclear standards of suspicion." *Id.* With the rules nullified, any challenge to the statute would be akin to a declaratory judgment that is normally addressed on the trial level.

Pilots Ass'ns and the instant case.[13] Here, the age-based rules have not been nullified but codified. The government is seeking to dismiss the claims of the Petitioners based on the statute *without addressing the underlying injuries*. Moreover, the organization in *Coalition of Airline Pilots Ass'ns* implied that it would still like to challenge the statute's language on flaws unrelated to the original claims. However, they could just as well secure such relief before a trial court since its members were not subject to the prior denial of procedural due process. The Petitioners in this case could not secure the same relief. The government has maintained that it cannot act on the petitions because the statute nullified both the Age 60 Rule and the process for review. If dismissed, the pilots could challenge the new law, but the government would clearly assert that reinstatement of prior salaries or status could not be sought as relief. Unlike a general statutory challenge by organizations, the statute in this case is the specific cause for the alleged invalidity of their claims.

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[13] Likewise, this is not a circumstance "[w]here Congress enacts intervening legislation that definitively resolves the issues a litigant seeks to put before us, the claims are moot and we are precluded from deciding them." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1309 (D.C. Cir. 2004). *Nuclear Energy Inst.*, relied upon by the government, dealt with a challenge to the selection of a nuclear repository site in Nevada. Once Congress selected the site by statute, the process for selecting the site was no longer relevant because a congressional decision had been made. In *Nuclear Energy Inst.*, the Court clearly concluded that the resolution was a proper congressional determination of a nuclear site. Nevertheless, the Court explored the authority and intent behind the resolution: the very step that the government seeks to avoid in this case.

The lower court does not cite a single circuit where courts follow a rule that a new statute can be applied to dismiss an action but not reviewed for its validity. Under the government's approach, Congress could pass wildly unconstitutional bills based on racial, religious, or gender discrimination that would extinguish cases without recourse for the litigants. If the Congress passed a law that modified the Age 60 Rule to allow only older white pilots to fly, it would be absurd to apply such a facially unconstitutional law without addressing the challenges raised by the petitioners.

As discussed below, it is of no import that this law became an issue in a petition review filed directly with the appellate court. It is true that such petitions would not be the appropriate means for litigants to challenge a federal statute as part of its original claim. In this case, however, the statute is being used to dismiss the petitions. It was the government that put the validity of the Act at issue on the appellate level by claiming it as a dispositive source requiring dismissal of all of the consolidated cases. In doing so, the FAA picked this petition process to address the statutory claim and challenge. There must be some judicial review beyond a superficial determination of subject-matter relevance of a statute. While a court may reserve broader challenges to a statute that are not relevant to the statute's application in a given petition case, it must address those claims of unconstitutionality that would make the law inapplicable or invalid as a determinative source for dismissal.

II. THE *ADAMS* RULE PRESENTS AN IMPORTANT QUESTION AS TO WHETHER COURTS ARE BARRED FROM ADDRESSING THE VALIDITY OF A STATUTE IN REVIEWING FAA PETITIONS.

The new rule regarding FAA petitions denies the most basic component of due process: the consideration of challenges to the applicability of a statute before the denial of relief in the federal courts. *See* Sup. Ct. R. 10(c). "This Court has not hesitated to find the proceedings violative of due process" when litigants are denied basic standards of review. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (citing *Tumey v. Ohio*, 273 U.S. 510 (1927); *Brown v. Mississippi*, 297 U.S. 278 (1936); *In re Oliver*, 333 U.S. 257 (1948); *In re Winship*, 397 U.S. 358, 361 (1970)). In these petition cases, the court of appeals is the original court of review and must address factual inconsistencies and legal challenges raised by the petitioners. The D.C. Circuit has insisted on such complete records from district courts. *See United States v. McCants*, 434 F.3d 557, 562-563 (D.C. Cir. 2006) (citing *United States v. Chaikin*, 960 F.2d 171, 175 (D.C. Cir. 1992)).

There is no difference between petition cases and non-petition cases when the government seeks to apply a statute as a determinative legal source. The opposing party has a right to contest the applicability and validity of the statute. The lower court cites 49 U.S.C. § 46110(a) without explanation as to the limitation on its consideration of the invalidity of the statute. The interpretation of this provision would affect a great array of such petitions. *See* Sup. Ct. R. 10(c). Yet, nothing in that provision robs a federal

court of the most basic authority and responsibility to apply only valid and enforceable laws. Indeed, such a provision would raise serious constitutional questions in its own right by forcing federal courts to apply facially unconstitutional statutes. While the lower court did not rely on 49 U.S.C. § 46110(c), that provision on the "authority of the court" also lacks such a limitation. It simply states that

> When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

The Petitioners were not asking for the statute to be struck down in a pseudo-declaratory judgment action. They were seeking to prevent the application of the statute to their cases due to its invalidity and to require further proceedings. The language of 49 U.S.C. § 46110 affirms the broad authority of a court in reviewing and taking appropriate action. The express limitation on the review concerns setting aside findings of fact, not law.

The lower court states without explanation that it is beyond the jurisdictional grant of 49 U.S.C.

§ 46110(a) for the court to give "*initial* review" of a new statute in a petition case. *Adams*, 550 F.3d at 1176 (emphasis in the original). This rule, however, would have federal courts blindly applying a statute until a district court addresses it in an *initial* review, even when (as here) the panel expressed skepticism in oral argument over the constitutionality. More importantly, the rule would severely penalize any petitioners who happened to have appeals that preceded any such initial review before a district court. Petitioners only have a short period in which to appeal these orders while such a challenge could take years in the district court. If they happen to have their livelihoods terminated in an order before an initial challenge (and resolution) on the district court level, they are simply treated as dismissed without recourse.

Since factual deference is expressly required, the main function of a federal court is to determine if an agency has exceeded, or failed to follow, the dictates of federal law. Just as a court must determine if an agency has correctly interpreted a federal law that is cited as the basis for an order, it must also review a statute being relied upon for the dismissal of a challenge to such an order. In this case, the sole reason for the denial of reconsideration was a legal interpretation of the validity and meaning of the new statute. (App. B). By refusing to address the alleged invalidity of that law, the D.C. Circuit denied any meaningful review to these pilots. Under such an approach, citizens can be denied their property or livelihood without any judicial review to establish that an agency is not misconstruing, misrepresenting or manipulating federal law.

When considering new legislation outside of such appeals from agency orders, this Court has never adopted a rule that courts are prevented from considering facial challenges to statutes used as the basis for a dismissal of petitions or claims. To the contrary, past mootness cases show that the underlying statutes must be determined to be valid (unless the petitioners did not challenge the validity of the statute). *See, e.g., Dep't of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986), *Kremens v. Bartley*, 431 U.S. 119, 128-30 (1977); *Bd. of Pub. Util. Comm'rs v. Compania General De Tabacos De Filipinas*, 249 U.S. 425, 426 (1919), *Berry v. Davis*, 242 U.S. 468, 470 (1917). Indeed, this Court has expressly declined to dismiss cases on the basis of new statutes that may be subject to challenge – even when the parties have not raised such a challenge (unlike the instant case). In *Diffenderfer v. Cent. Baptist Church of Miami, Inc.*, 404 U.S. 412 (1972) (per curiam), the plaintiffs challenged a Florida statute that exempted certain church commercial property from taxation. After the law was challenged under the religion clauses, the state legislature changed the law to only exempt property used primarily for religious purposes. The Court felt that dismissal on the basis of an untested statute would be unwarranted:

> Because it is possible that appellants may wish to amend their complaint so as to demonstrate that the repealed statute retains some continuing force or to attack the newly enacted legislation, rather than remanding the case to the District Court for dismissal as is our usual practice when a case has become moot pending a decision by this Court, . . . we vacate the judgment of the District Court and remand the

> case to the District Court with leave to the appellants to amend their pleadings.

Diffenderfer, 404 U.S. at 415. In *Diffenderfer*, the Court would have presumably ruled on a constitutional challenge of invalidity if it had been briefed and resolved by the lower court.[14] In the instant case, the Petitioners fully briefed the alleged constitutional infirmities of the new Act, but the lower court held that only dismissal was appropriate without consideration of such challenges.

When the government introduced the new Act as the basis for dismissal, it made the validity and applicability of that statute part of the case. *Cf.*, *Fusari v. Steinberg*, 419 U.S. 379, 389 n.13 (1975) (concluding that dismissal was inappropriate and that the lower court should have looked closely at the new statute which became part of the "whole case" by its invocation). Just as the government had to defend the legality of the original Age 60 Rule and related regulations, it now has an obligation to establish the

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[14] Notably, even when the Court has found that new legislation mooted an original claim, it has previously declined to dismiss the entirety of a case when the basis is a new and unchallenged statute. In *Lewis v. Continental Bank*, 494 U.S. 472, 482 (1990), the Court voted unanimously to send a case back to the lower court to allow for a full consideration of a new statute that mooted the original claim. Justice Scalia noted that "in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully." *Id.*

validity of the modified Age 60 Rule and the law invoked to extinguish these petitions. Otherwise, as noted above, Congress could enact the most facially unconstitutional laws based on race, religion, gender or age discrimination with the assurance that the discriminatory laws will be applied without review by federal courts.

These pilots have lost decades of earned benefits and status based on age-based discrimination that the Congress has declared to be without foundation. The government then allowed exemptions for dozens of pilots while barring such exemptions for other pilots. The D.C. Circuit declined to address the factual and legal challenges raised by the Petitioners. *Cf. United States v. Morico*, 415 F.2d 138, 141 (2d Cir. 1969) (review "must be meaningful in the sense that it must encompass a record from which a court can determine whether there was a basis in fact for decision, what that basis was and whether the board applied the correct legal standard."). The rule in *Adams* conflicts with the rulings of this Court and undermines the integrity and credibility of the federal system as a whole.

III. THE D.C. CIRCUIT IGNORED ALTERNATIVE STATUTORY INTERPRETATIONS TO ASSUME A PROHIBITION ON EXEMPTIONS, DESPITE THE FAA'S ALLOWANCE OF SUCH POST-ENACTMENT EXEMPTIONS FOR OTHER PILOTS.

The statute is silent on the issue of exemptions. The lower court simply stated conclusorily that "[t]he Act, which expressly abrogates the Age 60 Rule, moots

the petitions for review of the orders denying exemption from the Age 60 Rule." *Adams*, 550 F.3d at 1176. Yet, the first statement that the Act abrogates the old rule does not necessarily support the second conclusion that it moots the exemption process. In dismissing the petitions, the court ignores any other possible interpretation of the statute and the fact that the government's interpretation is contradicted by its own allowance of exemption for pilots *after the enactment of the new Act*. Because the panel offers only a conclusory line in its holding, and declines to give any justifying reason as part of a reconsideration of the decision, the litigants are left without any indication of whether the Court considered this issue or any information on the basis for the decision.[15]

There was no express statutory authority for the prior Age 60 Rule exemption process. Rather, these exemptions fall under a standard regulatory process under 49 U.S.C. § 46110(a). The federal code states at 49 U.S.C. § 44701(f): "The Administrator may grant an exemption from a requirement of a regulation prescribed under subsection (a) or (b) of this section or any of sections 44702-44716 of this title [49 USCS §§ 44702-44716] if the Administrator finds the exemption is in the public interest." *See also* 14 C.F.R. § 11.81 (exemption requirements under which pilots show "the exemption would not adversely affect safety,

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[15] This Court has rejected the notion of deference to lower courts that have declined such explanations in other areas. *Cf. Foman v. Davis*, 371 U.S. 178, 182 (1962) (rejecting deference when a district court refuses to give "any justifying reason" on barring the amendment of a complaint and finding the act to be "abuse of that discretion and inconsistent with the spirit of the Federal Rules."). The same minimal standard should apply to the Petitioners.

or how the exemption would provide a level of safety at least equal to that provided by the rule from which you seek the exemption."). The FAA denied these petitions on one ground only: it would not consider individual qualifications of pilots and would enforce a categorical age-based denial of petitions. In each letter, the FAA explained that:

> The FAA recognizes that those persons approaching age 60 are, in general, experienced pilots. Thus, a general expansion of the current age limit may be appropriate. That proposal will be subject to public notice and comment, as required by the Administrative Procedure Act. However, the FAA has not yet changed the rule, and there is still an age limit of 60 for pilots serving in part 121 operations.

(App. C at 11a) The sole basis for the initial denial was clearly stated as the fact that "there is still an age limit of 60" and the refusal of the FAA to consider any exemptions. In its later denial of reconsideration, the FAA based its denial entirely on the new statute – making the statutory interpretation of the Act critical to this appeal. The continued applicability of such rules and the interpretation of the statute is a matter of law subject to *de novo* review by the reviewing court.

The new law prohibited *the denial* of flying privileges on the basis of the old Age 60 Rule. It did not prohibit the FAA from continuing its prior regulatory practice of exemptions to allow pilots to fly without penalties due to age. Indeed, there is no legislative history on this provision which was put in verbatim by Chairman Oberstar after a demand by

ALPA.[16] Under 49 U.S.C. § 44729(e)(1), the age-related denial of status and benefits is barred pursuant to claims "under any labor agreement or employment policies of the air carrier." This does not necessarily bar the retention of status and benefits pursuant to an exemption allowed by the FAA. Given the FAA's allowance of dozens of exemptions since the enactment, an alternative reading of this provision is that Congress sought to protect airlines against lawsuits by negating past contracts. Airlines were clearly concerned about their liability and responsibilities for pilots who were previously terminated on the basis of age. When allowed to continue to fly with full seniority and status on the basis of an FAA order, the law could still be claimed to protect airlines from pre-existing contractual agreements. Thus, the FAA could allow (as it has done with dozens of other pilots) the Petitioners to retain their status and seniority to permit them to continue to fly aircrafts while offering some protection to airlines regarding prior contracts.

The government never denied that dozens of pilots have been allowed to continue with airlines with their

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[16] In the final stage of briefing below, the government simply theorized that one such possible unstated rationale is that Congress wanted to protect against "disharmony in the workplace" by negating the status and salaries of senior pilots. (Gov't Br. at 42.) Obviously, the complete denial of prior status and salaries would not create or preserve "harmony" but would produce inevitable discord in the workplace. Such "harmony" is achieved by terminating all those deemed unharmonious by ALPA – senior pilots who turned 60 before the enactment date. This disharmony is magnified by the issuance of exemptions to the new Age 60 Rule for dozens of pilots while denying such exemptions to other similarly situated pilots.

seniority and salaries unchanged despite the fact that they turned 60 before enactment. These exempted pilots are allowed to continue to fly with their prior status and salaries unchanged – as under the original exemption process. Petitioners confirmed that at least 26 pilots over the age of 60 years have been allowed to continue as pilots with their prior benefits at Continental Airlines.[17] Obviously, some exemption process remains for dozens of pilots who have been allowed by the FAA to continue in their livelihoods while Petitioners are denied the same exemptions.[18]

Notably, the FAA's position with regard to the Continental pilots is consistent with the advisory opinion issued by the FAA on the proper interpretation of the modified Age 60 Rule. On March 13, 2008, the FAA addressed the status of various pilots who turned 60 before the enactment date but were performing flight checks on aircrafts rather than flying the planes. While the FAA believes that these pilots were "required flight crewmembers" and indistinguishable from other pilots, it said that airline companies, not the FAA, would make such decisions on "economic issues" such as continued benefits and seniority.[19] *See*

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[17] *See http://www.seniorpilotscoalition.org/CALPilotBid09-07.pdf* and *http://www.seniorpilotscoalition.org/CALPilotBidList.pdf*

[18] In addition to Continental Airlines, pilots with FedEx who turned 60 before enactment of the statute have been allowed to continue to fly in positions covered by the law. At least three chief pilots have been allowed to continue without loss of seniority or salaries. *Id.*

[19] After being cited by senior pilots, this statement was removed from the website.

Pet. Opening Br. (Addendum C). The FAA has clearly continued to allow exemptions and it is not clear why other pilots cannot seek similar exemptions – particularly Petitioners who filed for exemption before the enactment of the law.[20] Thus, the agency has previously followed an interpretation in dozens of cases that some form of exemption continues after December 13, 2007.

The lower court allowed the FAA to dismiss dozens of petitions under a claim that no exemptions are now possible while fully aware that dozens of exemptions have been allowed under the new law. At a minimum, as argued below, this matter should be returned either to the FAA for further determinations or to the lower court for further explanation on the existence of post-enactment exemptions.

Ultimately, this uncertainty only magnifies the flaws in the mootness decision below. This Court has declared a case moot when legislation makes it "impossible" to render relief. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). Thus, in past cases of mootness, the Court found clear statutory barriers making relief impossible. In *Dep't of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986), the court found that an equal protection challenge under a federal firearms statute was moot when Congress removed entirely the discriminatory treatment. In the instant

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[20] Even in its briefing below, the government did not deny that such exemption might be possible – stating instead that an exemption "process has yet been established" under the new Act. (Gov't Br. at 27.) Yet, any exemptions for these dozens of pilots would have had to occur under a continuation of the prior exemption process.

case, Congress continued to maintain a discriminatory provision based on age. More importantly, the statute does not expressly abrogate the authority of the FAA to continue to grant exemptions – which have in fact continued after the enactment. The lower court cannot claim impossibility to render relief when it refuses to even address such factual and legal arguments that relief is possible.

Likewise, the Court has held a subsequent statute mooted a challenge to a statute that contained an unlawful delegation of legislative power when Congress proceeded to detail the agency's responsibilities. *Bd. of Pub. Util. Comm'rs v. Compania General De Tabacos De Filipinas*, 249 U.S. 425, 426 (1919). Also, in *Berry v. Davis*, 242 U.S. 468, 470 (1917), the Court addressed a challenge to a lawsuit requiring a mandatory vasectomy on the plaintiffs. The lawsuit was moot after the law was changed so that it was no longer applicable to the plaintiff, making further relief impossible.

Contrary to the lower court's opinion, this Court has refused to assume that a new statute would work to block any relief. Thus, in *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975), the Court was presented with a case where the Connecticut legislature amended a statute that had been found to violate the due process clause to add the needed procedural protections for unemployment compensation. While the lower court did not feel at liberty to address the new procedures in the existing case, this Court reversed the decision and declined to declare the case moot without a consideration of the new legislation and how it would affect the litigants. In this case, the lower court ignored specific claims of how the new statute might

not preclude the relief sought by the Petitioners, but declined to consider how the statute might be applied to Petitioners, particularly in light of the known exemptions given to other pilots.

The status of the pilots under the old and new rule remains largely unchanged: they are denied their salary, status, and seniority due to their age. *See Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 609 (2001) (quoting *Friends of Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 189 (2000)) (holding that a legislative change "'does not deprive a federal court of its power to determine the legality of the practice' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"); *cf. Zessar v. Keith*, 536 F.3d 788, 793 (7th Cir. 2008) (noting that mootness determination was supported by the fact that "the amended Code is not substantially similar to the challenged provisions of the pre-amendment Code."). Moreover, as a practical matter, Petitioners are barred from flying commercial passenger aircrafts due to the loss of their seniority and status. Absent an exemption allowing them to retain their seniority and status, it is practically impossible for them to resume flying such aircraft which requires not just the hiring of an older pilot but re-starting as a new pilot. *Cf. Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1548 (8th Cir. 1996) ("If the new statute disadvantages [Smithfield] in the same fundamental way the repealed statute did, the amendment does not divest the court of the power to decide the case."); *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, (8th Cir. 2004) (same).

While the government has relied on *Kremens v. Bartley*, 431 U.S. 119 (1977), that case reinforces the position of the Petitioners. The Court was faced with a case where the rights that plaintiffs had sought to establish in litigation were in fact included in a new law. The matter was mooted by legislation awarding the very rights sought by the litigants. The correct analogy to the current case would be if Congress nullified the Age 60 Rule and returned the pilots to their prior positions with compensation for lost wages and status. Instead, Congress enacted a new or modified Age 60 Rule that is constitutionally infirm.

Due to the failure of the D.C. Circuit to address alternative interpretations of the statute or the FAA's own allowance of exemptions, Petitioners have been denied an opportunity to specifically contest such determinations on appeal. If these pilots are to lose their livelihoods, they deserve, at a minimum, to be given a reasoned basis for this decision. By simply adopting the agency interpretation and refusing to review the new statute, the lower court denied the pilots substantive review guaranteed under 49 U.S.C. § 46110(a) and the Due Process Clause of the Fifth Amendment of the United States Constitution.

CONCLUSION

For the reasons stated above, Petitioners respectfully submit that their petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1180

Decided December 19, 2008
Argued November 10, 2008

GRANT O. ADAMS, ET AL.,
PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION AND UNITED STATES DEPARTMENT OF TRANSPORTATION,
RESPONDENTS

Consolidated with 07-1194, 07-1226, 07-1326, 07-1366, 07-1390, 07-1447, 07-1507, 07-1524, 08-1023, 08-1360

On Petition for Review of an Order of the Federal Aviation Administration

Jonathan R. Turley argued the cause and filed the briefs for petitioners.

Edward Himmelfarb, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief were *Gregory G. Katsas*, Assistant Attorney

General, and *Michael Jay Singer*, Attorney. *Robert S. Greenspan*, Attorney, entered an appearance.

Jonathan A. Cohen, *Marta Wagner* and *David M. Semanchik* were on the brief for *amicus curiae* Air Line Pilots Association, International in support of respondents.

Ronald G. Birch was on the brief for *amici curiae* Airline Pilots Against Age Discrimination, et al. In support of respondents.

Before: GINSBURG and BROWN, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* BROWN.

BROWN, *Circuit Judge*: Petitioners are commercial airline pilots who reached the age of 60 before December 13, 2007. As many pilots have done before them, these pilots filed requests for an exemption with respondent, the Federal Aviation Administration (FAA), from the regulation barring them from flying commercial aircraft after they turned 60. 14 C.F.R. § 121.383(c) (Age 60 Rule).[1] The FAA denied their

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[1] The FAA promulgated the so-called Age 60 Rule in 1959. In its latest form, it provided:

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in

requests for exemption. Petitioners filed petitions for review in this Court under 49 U.S.C. § 46110(a), which permits direct challenges to "an order issued by . . . the Administrator of the Federal Aviation . . . ."[2]

On December 13, 2007—after some but not all of the petitions for review were filed with this Court—the President signed into law the Fair Treatment for Experienced Pilots Act (FTEPA or the Act), codified at 49 U.S.C. § 44729. The Act provides, among other things, that the maximum age limit for pilots flying large commercial aircraft now is 65. *Id.* § 44729(a). The Act expressly repeals the regulation that was the Age 60 Rule, stating "[o]n and after the date of enactment of this section, section 121.383(c) of title 14, Code of Federal Regulations, shall cease to be effective." *Id.* § 44729(d).

Respondents say the Act moots these petitions for review because there is no longer an Age 60 Rule from which to exempt the petitioners. Petitioners respond that the Act cannot moot their petitions for review

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> operations under this part if that person has reached his 60th birthday.

14 C.F.R. § 121.383(c).

[2] Petitioners also filed petitions for reconsideration with the FAA. Pending petitions for agency reconsideration normally would render the petitions for review in this Court incurably premature. *See, e.g., Clifton Power Corp. v. FERC*, 294 F.3d 108, 110–11 (D.C. Cir. 2002). The FAA denied the petitions for reconsideration during this litigation, however, and petitioners have since filed new petitions in this Court. These have been consolidated with their original petitions.

because the Act itself is unconstitutional. Specifically, petitioners object to the treatment of pilots who reached age 60 before the FTEPA's enactment (and were ineligible to fly under the regulatory Age 60 Rule) but are not yet 65 (and are not yet ineligible to fly under the Act). The statute denies such pilots any seniority or benefits from their prior (pre-age 60) years of service if they are hired or rehired by an airline. *Id.* § 44729(e)(1)(B). In petitioners' view, this provision is a constitutionally-prohibited bill of attainder and a violation of their rights to due process and equal protection. Petitioners do not, however, challenge the Act's abrogation of the Age 60 Rule.

Petitioners fail to recognize we do not have jurisdiction to consider constitutional questions unrelated to the FAA's order. As long as petitioners can satisfy the usual Article III standing requirements, their facial challenges to the Act must be brought in the district court in the first instance, which has original jurisdiction over federal question claims under 28 U.S.C. § 1331. Petitioners insist we cannot dismiss the petitions as moot as a result of the statute without considering the validity of the statute, but they fail to cite any persuasive authority.

By contrast, respondents direct our attention to *Coalition of Airline Pilots Associations v. FAA*, 370 F.3d 1184 (D.C. Cir. 2004), involving the due process rights of pilots the Transportation Security Administration deemed security risks. Congress passed a statute during the litigation changing the procedures the agency had adopted by regulation. *Id.* at 1188. Congress's action mooted the controversy then before the Court. *Id.* at 1190–91. When the petitioners in that case argued the statute itself was infirm, this

Court established a clear boundary: "[T]o the extent the Coalition is attacking [the new statute], and not the rules themselves, we lack jurisdiction to consider such a claim. If the Coalition wishes to challenge the new statute, it must do so in the district court." *Id.* at 1191.

Coalition of Airline Pilots Associations is on point. The Act, which expressly abrogates the Age 60 Rule, moots the petitions for review of the orders denying exemption from the Age 60 Rule. And if petitioners wish to challenge the constitutionality of the statute on its face, they should— assuming they can show Article III standing—file a complaint in the district court. Seeking *initial* review of the statute here extends beyond the jurisdictional grant of 49 U.S.C. § 46110(a). Accordingly, the petitions for review are dismissed.

So ordered.

APPENDIX B

U.S. Department of Transportation
Federal Aviation Administration
Office of the Administrator
800 Independence Ave., S.W.
Washington, D.C. 20591

OCT 23, 2008

Exemption No. 9214A
Regulatory Docket No. FAA-2007-27537

Mr. Jonathan Turley
2000 H Street, NW.
Washington, DC 20052

Dear Mr. Turley:

This letter is to inform you that we are denying your petition for reconsideration on behalf of Mr. Grant O. Adams concerning the Age 60 Rule. This letter explains the basis of our decision and transmits that decision to you.

The Basis for our Decision

On June 8, 2007, you petitioned the Federal Aviation Administration, on behalf of Mr. Adams, for reconsideration of Denial of Exemption No. 9214 from § 121.3839(c) of Title 14, Code of Federal Regulations (14 CFR), commonly referred to as the Age 60 Rule, to the extent necessary to permit Mr. Adams to act as a

pilot in operations conducted under part 121 after reaching his 60th birthday.

On December 13, 2007, President Bush signed into law the "Fair Treatment for Experienced Pilots Act." The Act has now been codified at Title 49 of the United States Code, section 44729. It prohibits persons who turned 60 before the effective date of the Statute from serving as pilots in part 121 operations unless certain conditions are met. Specifically, no person may serve as a pilot for an air carrier engaged in covered operations unless (1) he or she was in the employment of that air carrier in such operations on December 13, 2007 as a required flight deck crew member or (2) he or she is newly hired by an air carrier as a pilot on or after December 13, 2007 without credit for prior seniority or prior longevity for benefits or other terms related to length of service prior to the date of rehire under any labor agreement or employment policies of the air carrier.

We realize that your request for exemption pre-dates enactment of the Statute; however, we cannot retroactively grant an exemption from a requirement that no longer exists. Nor does the Statute give the FAA the authority to grant exemptions from its requirements. Accordingly, we do not have any discretion to grant exemptions to the provisions of the legislation.

The FAA's Decision

In consideration of the foregoing, I find that the FAA does not have the authority to grant an exemption to the requirements of 14 CFR § 121.383(c). Therefore,

your petition for reconsideration of the denial of exemption is hereby denied.

Sincerely,

/s/
Robert A. Sturgell
Acting Administrator

APPENDIX C

U.S. Department of Transportation
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D.C. 20591

APR 13, 2007

Exemption No. 9214
Regulatory Docket No. FAA-2007-27537

Mr. Grant O. Adams
516 St. Vincent Lane
Foster City, CA 94404

Dear Mr. Adams:

This letter is to inform you that we are denying your petition for exemption from the Age 60 Rule. This letter explains the basis of our decision and transmits it to you.

The Basis for our Decision

On March 5, 2007, you petitioned the Federal Aviation Administration (FAA) for an exemption from § 121.383 (c) of Title 14, Code of Federal Regulations (14 CFR), commonly referred to as the Age 60 Rule, to the extent necessary to permit you to act as a pilot in operations conducted under part 121 after reaching your 60th birthday.

Under the authority of 49 U.S.C. § 44701(f), the FAA, in its discretion, may grant an exemption from the requirements of a regulation if it finds that such an exemption is in the public interest. The petitioner has the burden of showing that an exemption is justified and in the public interest.

On September 28, 2006, the FAA established an Aviation Rulemaking Committee (ARC) to make recommendations on whether the FAA should change the existing Age 60 Rule so that the United States would be consistent with a pending change to the International Civil Aviation Organization (ICAO) standard. The ARC submitted its report on November 29, 2006. The report is available to the public through the Docket Management System at http://dms.dot.gov at any time or you can go to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, D.C., between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays (Reference Docket No. 26139). The report is document number 5785 and a separate document that contains appendices to the report is document number 5786 in that docket. The ARC did not reach a consensus on whether the FAA should adopt the new ICAO standard, but it did recommend that any future change should be prospective.

On November 23, 2006, ICAO revised the upper age limit in the Standards and Recommended Practices to Annex 1–Personnel Licensing as follows:

> 2.1.10.1: A Contracting State, having issued pilot licenses, shall not permit the holders thereof to act as pilot-in-command of an aircraft engaged in international commercial air

> transport operations if the license holders have attained their 60th birthday or, in the case of operations with more than one pilot, where the other pilot is younger than 60 years of age, their 65th birthday.
>
> 2.1.10.2: **Recommendation.** A Contracting State, having issued pilot licenses, should not permit the holders thereof to act as co-pilot of an aircraft engaged in international commercial air transport operations if the license holders have attained their 65th birthday.

The ICAO standard and recommendation do not require the FAA to change its existing regulations. However, the FAA has decided to move forward with the rulemaking initiative and is currently developing a proposal (a notice of proposed rulemaking) to revise the Age 60 Rule in response to the new ICAO standard. The FAA recognized that those persons approaching age 60 are, in general, experienced pilots. Thus, a general expansion of the current age limit may be appropriate. That proposal will be subject to public notice and comment, as required by the Administrative Procedure Act. However, the FAA has not yet changed the rule, and there is still an age limit of 60 pilots serving in part 121 operations.

While we are sympathetic to the individual circumstances of pilots such as yourself who have applied for an exemption while the rulemaking process is ongoing, the FAA simply cannot overturn more than 40 years of precedent in this area without a deliberative process. To do so would circumvent the public notice and comment requirements of the Administrative Procedure Act and appear to

presuppose the outcome of our proposal. You have not shown the public interest warrants relief for individual pilots. This situation is more appropriately addressed via general rulemaking for a class of individuals than via an individual exemption. Please be assured that we are moving as quickly as possible with this rulemaking.

The FAA's Decision:

In consideration of the foregoing, I find that a grant of exemption would not be in the public interest. Therefore, pursuant to the authority contained in 49 U.S.C. §§ 40113 and 44701 delegated to me by the Administrator, your petition for an exemption from 14 CFR § 121.383(c) is hereby denied.

Sincerely,

/s/
James. J. Ballough
Director, Flight Standards Service

APPENDIX D

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1180
FAA-2007-27537

[Filed On: February 19, 2009]

Grant O. Adams, et al.,	)
	)
Petitioners	)
	)
v.	)
	)
Federal Aviation Administration and United States Department of Transportation,	)
	)
Respondents	)

September Term 2008

Consolidated with 07-1194, 07-1226, 07-1326, 07-1366, 07-1390, 07-1447, 07-1507, 07-1524, 08-1023, 08-1360

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

No. 08-1452

In the Supreme Court of the United States

GRANT O. ADAMS, ET AL., PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners are pilots who petitioned for, and were denied, exemptions from the Federal Aviation Administration's "Age 60 Rule," 14 C.F.R. 121.383(c) (2007), which at the time of their petitions prohibited pilots from flying for commercial airlines after reaching age 60. Under the Fair Treatment for Experienced Pilots Act, Pub. L. No. 110-135, § 2(a), 121 Stat. 1450, the Age 60 Rule "cease[d] to be effective" on December 13, 2007. On direct review in the court of appeals, petitioners raised constitutional objections to a provision of the Act placing conditions on rehiring pilots over 60 years of age, but conceded that they did not challenge the provision abrogating the Age 60 Rule. The questions presented are as follows:

1. Whether petitions for review of an agency order denying exemption from a regulation become moot upon the enactment of a concededly valid statutory provision expressly abrogating that regulation.

2. Whether a court of appeals with jurisdiction only to review "an order issued by * * * the Administrator of the Federal Aviation Administration," 49 U.S.C. 46110(a), lacks jurisdiction to decide a constitutional challenge to a statute not implicated by the order under review.

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In the Supreme Court of the United States

No. 08-1452

GRANT O. ADAMS, ET AL., PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 550 F.3d 1174. The relevant orders of the Federal Aviation Administration regarding the lead petitioner (Pet. App. 6a-8a, 9a-12a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2008. A petition for rehearing was denied on February 19, 2009 (Pet. App. 13a-14a). The petition for a writ of certiorari was filed on May 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

In addition to the provisions reprinted at Pet. 1-3, the Fair Treatment for Experienced Pilots Act, Pub. L. No. 110-135, § 2(a), 121 Stat. 1450 (adding 49 U.S.C. 44729(d)), provides:

> SUNSET OF AGE 60 RETIREMENT RULE.—On and after the date of enactment of this section, section 121.383(c) of title 14, Code of Federal Regulations, shall cease to be effective.

STATEMENT

1. Congress has charged respondent Federal Aviation Administration (FAA) with "promot[ing] safe flight of civil aircraft in air commerce by prescribing," among other things, "regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers," and with establishing of "minimum safety standards" for air carriers. 49 U.S.C. 44701(a)(4) and (b)(1). By statute, FAA "shall carry out [such responsibilities] in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation" and shall consider "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. 44701(c) and (d)(1)(A).

a. Under that mandate, FAA promulgated the so-called "Age 60 Rule" in 1959. The rule provided that "[n]o certificate holder may use," and "[n]o person may serve as," "a pilot on an airplane engaged in operations under [14 C.F.R. Pt. 121] if that person has reached his 60th birthday." 14 C.F.R. 121.383(c).[1] FAA adopted the

---

[1] Until 1995, Part 121 carriers were primarily those operating aircraft with a seating capacity of more than 30 passengers as commercial

Age 60 Rule out of concern for the danger to the public if the pilot of a commercial aircraft suddenly became incapacitated. See 24 Fed. Reg. 5248 (1959). In its original rulemaking, FAA found "that there is a progressive deterioration of certain important [physiological] and psychological functions with age, that significant medical defects attributable to this degenerative process occur at an increasing rate as age increases, and that sudden incapacity due to such medical defects becomes significantly more frequent in any group reaching age 60." *Id.* at 9767. It also found that such incapacity cannot be predicted accurately. *Ibid.* Accordingly, FAA decided to prohibit persons from piloting large commercial aircraft after reaching age 60. *Id.* at 9768.

b. The Age 60 Rule was soon challenged. In *Air Line Pilots Ass'n, International* v. *Quesada*, 276 F.2d 892, 898 (1960), the Second Circuit found "considerable support" for the rule, and upheld it as a reasonable exercise of FAA's authority to protect the public safety. Then, in 1970, the Air Line Pilots Association petitioned FAA to revoke the Age 60 Rule, but after informal public hearings, FAA denied the petition. The D.C. Circuit upheld FAA's decision not to revoke the rule, concluding that the agency's decision was not unreasonable, "[g]iven the inconclusiveness of appellants' evidence and the existence of contrary views." *O'Donnell* v. *Shaffer*, 491 F.2d 59, 63 (1974) (footnotes omitted).

In 1979, Congress directed the National Institutes of Health (NIH), in consultation with the Secretary of Transportation, to conduct a study of the Age 60 Rule.

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common carriers. See 14 C.F.R. 121.1(a)(5)(ii) (1995). Part 121 was amended in 1995, and now applies to the operations of the somewhat broader group of persons described in 14 C.F.R. Pt. 119. See 14 C.F.R. 121.1(a).

Act of Dec. 29, 1979, Pub. L. No. 96-171, 93 Stat. 1285. Although NIH found "no special medical significance to age 60 as a mandatory age for retirement of airline pilots," it recommended retaining the rule because there was no "medical or performance appraisal system that can single out those pilots who would pose the greatest hazard because of early, or impending, deterioration in health or performance." *Professional Pilots Fed'n* v. *FAA*, 118 F.3d 758, 761 (D.C. Cir. 1997) (quoting NIH, *Report of the National Institute on Aging, Panel on the Experienced Pilots Study* 1 (Aug. 1981)), cert. denied, 523 U.S. 1117 (1998).

The NIH study also recommended that FAA or another appropriate federal agency collect the medical and performance data necessary to consider changing the Age 60 Rule. Responding to that recommendation, FAA issued an advance notice of proposed rulemaking in 1982, seeking public input and data on the effects of aging on pilot performance. 47 Fed. Reg. 29,782. FAA proposed an eight-year experiment, using a select group of volunteer pilots who would continue flying until age 62 and would be subject to extensive quarterly testing. *Id.* at 29,783-29,784. After considering hundreds of comments, however, FAA withdrew the proposal. 49 Fed. Reg. 14,692 (1984). Among other things, FAA found no tests "that can adequately determine which individual pilots are subject to incapacitation" due to cardiovascular, cerebrovascular, or other disease, leaving it without "sufficient means for collecting quantitative medical and performance data on airline pilots over age 60 under conditions of actual operational stress and fatigue that do not introduce an unacceptable safety risk." *Id.* at 14,692, 14,693; see *id.* at 14,695. The following year, Congress held a hearing on the Age 60

Rule. *Age Discrimination & the FAA Age 60 Rule: Hearing Before the House Select Comm. on Aging*, 99th Cong., 1st Sess. (1985). The hearing resulted in no legislative action to rescind or alter the rule.

Several years later, prompted by a study expressing doubt about the correlation between accident data and pilot age, FAA announced it was considering whether to initiate a rulemaking on the Age 60 Rule. 58 Fed. Reg. 21,336 (1993); *id.* at 33,316. FAA held two days of hearings and received more than 3,000 comments in response. In the end, FAA decided not to initiate a rulemaking to change or repeal the rule. 60 Fed. Reg. 65,977 (1995). That decision was upheld in *Professional Pilots Federation*, *supra*.

Most recently, FAA established an Aviation Rulemaking Committee (ARC) to make recommendations on whether FAA should modify the Age 60 Rule to conform to the International Civil Aviation Organization's (ICAO) standard permitting two-pilot operations with one pilot up to 65 years of age, and one pilot up to 60 years of age. See 71 Fed. Reg. 62,399, 62,400 (2006).

c. Pilots have, over the years, petitioned for individual exemptions from the Age 60 Rule. FAA is permitted to grant such an exemption from its safety regulations and standards, if it "finds the exemption is in the public interest." 49 U.S.C. 44701(f). A petitioner must show "why granting the exemption would not adversely affect safety" or how it would "provide a level of safety at least equal to that provided by the rule from which you seek the exemption." 14 C.F.R. 11.81(e). No petitioner was able to satisfy that burden; accordingly, FAA denied all exemption requests. The courts of appeals have uniformly upheld those decisions. See, *e.g.*, *Butler* v. *FAA*, 109 Fed. Appx. 438 (D.C. Cir. 2004) (per curiam), cert.

denied, 544 U.S. 1027 (2005); *Yetman* v. *Garvey*, 261 F.3d 664 (7th Cir. 2001); *Baker* v. *FAA*, 917 F.2d 318 (7th Cir. 1990),[2] cert. denied, 499 U.S. 936 (1991); *Keating* v. *FAA*, 610 F.2d 611 (9th Cir. 1979); *Gray* v. *FAA*, 594 F.2d 793 (10th Cir. 1979); *Rombough* v. *FAA*, 594 F.2d 893 (2d Cir. 1979); *Starr* v. *FAA*, 589 F.2d 307 (7th Cir. 1978). The courts also held that FAA's policy of declining to grant exemptions from the Age 60 Rule was not an abuse of discretion. *Yetman*, 261 F.3d at 679; *Rombough*, 594 F.2d at 897-900; *Starr*, 589 F.2d at 311-314.

2. Petitioners are pilots who sought individual exemptions from the Age 60 Rule. The reasons they offered in support of an exemption were similar: they had a great deal of experience and should not be barred from flying commercial aircraft by a rule that did not take into account their individual ability to fly. Petitioners also raised a variety of legal objections to the Age 60 Rule itself. But petitioners submitted neither medical evidence supporting the claim that they individually deserved an exemption, nor a "proposed technique" not previously known to FAA "to assess an individual pilot's abilities and risks of subtle and sudden incapacitation." 60 Fed. Reg. at 65,980.

---

[2] *Baker* was a second petition for review in the same proceeding. Earlier, in *Aman* v. *FAA*, 856 F.2d 946 (7th Cir. 1988), the court of appeals had reviewed several exemption denials, and while it had upheld FAA's conclusion that the petitioners had not shown an effective protocol to screen out all pilots with an increased risk of incapacitation, it had remanded for a more detailed response to the petitioners' claim that experience offsets undetected physical losses. *Id.* at 957. After FAA responded, the matter returned to the court of appeals in *Baker*, which upheld FAA's denial of the exemptions.

a. FAA denied the requested exemptions. FAA's substantially identical letter to each petitioner—the letter to lead petitioner Adams is found at Pet. App. 9a-12a—stated that the agency was then engaged in a rulemaking to consider whether to change the Age 60 Rule. FAA explained that the ARC had issued a report on whether FAA should move to the age-65 standard of the ICAO but had not reached a consensus on the point. *Id.* at 10a. The letter informed each petitioner that:

> The FAA recognize[s] that those persons approaching age 60 are, in general, experienced pilots. Thus, a general expansion of the current age limit may be appropriate. That proposal will be subject to public notice and comment, as required by the Administrative Procedure Act. However, the FAA has not yet changed the rule, and there is still an age limit of 60 for pilots serving in part 121 operations.

Id. at 11a. FAA further explained that, while it was sympathetic with pilots who were applying for an exemption during the rulemaking process, it could not "overturn more than 40 years of precedent in this area without a deliberative process," adding that the "situation is more appropriately addressed via general rulemaking for a class of individuals than via an individual exemption." *Id.* at 11a-12a. At the time, the ARC was considering whether to recommend conforming the Age 60 Rule to the ICAO standard (see p. 5, *supra*), and FAA explained that allowing exemptions during the ARC's process was being conducted "would circumvent the public notice and comment requirements of the Administrative Procedure Act." Pet. App. 11a. FAA thus concluded that an exemption "would not be in the public interest" and denied the request. *Id.* at 12a.

b. Petitioners asked FAA to reconsider its denials and, more or less simultaneously, filed petitions for review in the court of appeals in ten separate actions, which were then consolidated. FAA denied reconsideration to all petitioners, concluding that the Fair Treatment for Experienced Pilots Act (see pp. 8-9, *infra*) had abrogated the Age 60 Rule, and that it now lacked the authority to grant the requested exemptions. Pet. App. 6a-7a.

3. On December 13, 2007—after FAA's initial denial of petitioners' petitions for exemption and after seven of the ten petitions for review were filed, but while FAA's rulemaking was pending and before FAA responded to the petitions for reconsideration—the President signed into law the Fair Treatment for Experienced Pilots Act (Act), Pub. L. No. 110-135, § 2(a), 121 Stat. 1450 (adding 49 U.S.C. 44729). Section 44729(a) provides that the age limit for pilots in Part 121 covered operations is now age 65. Section 44729(d) expressly abrogates the Age 60 Rule: "On and after the date of enactment of this section, section 121.383(c) of title 14, Code of Federal Regulations, shall cease to be effective."

The Act creates a temporary transitional regime for pilots who were between the ages of 60 and 65 on December 13, 2007—that is, those pilots who would be eligible under Section 44729(a), but who had been subjected to the Age 60 Rule. The Act strikes a balance that, among other things, respects younger pilots' settled expectations of seniority due to retirements under the Age 60 Rule, by allowing pilots subjected to the Age 60 Rule to fly until age 65, but only if they satisfy either of two conditions:

> (1) NONRETROACTIVITY.—No person who has attained 60 years of age before the date of enactment

> of this section may serve as a pilot for an air carrier engaged in covered operations unless—
>
> (A) such person is in the employment of that air carrier in such operations on such date of enactment as a required flight deck crew member; or
>
> (B) such person is newly hired by an air carrier as a pilot on or after such date of enactment without credit for prior seniority or prior longevity for benefits or other terms related to length of service prior to the date of rehire under any labor agreement or employment policies of the air carrier.

49 U.S.C. 44729(e)(1). The statute exempts air carriers from employment law liability for complying with the Act or any regulation carrying it out. 49 U.S.C. 44729(e)(2).

4. a. In the court of appeals, petitioners reformulated their challenge to the FAA orders denying them exemptions from the Age 60 Rule as a challenge instead to the constitutionality of the new statute. At oral argument, petitioners made clear that they were not challenging the Act *in toto*; rather they challenged only the loss-of-seniority provision in Section 44729(e)(1)(B) and the accompanying liability exemption of Section 44729(e)(2). Petitioners specifically conceded that they were *not* challenging the constitutionality of Section 44729(d), which abrogated the Age 60 Rule. App., *infra*, 1a-4a.

b. The court of appeals held that the petitions for review of the denial of exemptions from the Age 60 Rule were mooted by the Act's abrogation of the Age 60 Rule. Pet. App. 5a. The court of appeals stressed that "[p]etitioners do not * * * challenge the Act's abrogation of the Age 60 Rule," and explained that beyond that, it

could not address a broader constitutional challenge to the Act, because it lacked statutory jurisdiction to do so under 49 U.S.C. 46110(a), its only basis for direct review of FAA orders. Pet. App. 4a-5a (citing *Coalition of Airline Pilots Ass'ns* v. *FAA*, 370 F.3d 1184 (D.C. Cir. 2004)). The court noted that if petitioners wanted to challenge the constitutionality of the statute, they should bring an action in district court. *Id.* at 4a, 5a.

c. The court of appeals denied a petition for rehearing en banc on February 19, 2009. Pet. App. 13a-14a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of any other court of appeals or this Court. Moreover, petitioners principally seek review of a threshold jurisdictional issue, but their underlying claim is of limited and diminishing importance.

1. The orders on which jurisdiction was predicated in the court of appeals—orders that denied petitioners an exemption (or other relief) from the Age 60 Rule—are moot because the Act abrogated the Age 60 Rule in December 2007.

a. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). Not only must there be an actual case or controversy at the outset of the litigation, but the case or controversy must also continue throughout the litigation. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.") (internal quo-

tation marks omitted); *Coalition of Airline Pilots Ass'ns* v. *FAA*, 370 F.3d 1184, 1189 (D.C. Cir. 2004) (*Coalition*). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. . . . The parties must continue to have a personal stake in the outcome of the lawsuit." *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998) (internal quotation marks and citation omitted).

With exceptions not relevant here, when a statute or regulation that is the subject of legal challenge is repealed or abrogated, the legal challenge ceases to be a live controversy. "There must be a live case or controversy before this Court, and we apply the law as it is now, not as it stood below." *Kremens* v. *Bartley*, 431 U.S. 119, 128-129 (1977) (citation omitted) (new statute altering the rights of persons of a particular age group mooted their claims under an earlier statute). These "[m]ootness principles have direct and often obvious application in dealing with attacks on legislative rules that have expired or been repealed"; simply put, "[r]epeal * * * moots attacks on a statute." 13C Charles A. Wright et al., *Federal Practice & Procedure* § 3533.6, at 273, 277 (3d ed. 2008) (footnotes omitted); see *In re Bunker Ltd. P'ship*, 820 F.2d 308, 311 (9th Cir. 1987) ("Where intervening legislation has settled a controversy involving only injunctive or declaratory relief, the controversy has become moot.") (citing *Diffenderfer* v. *Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412 (1972) (per curiam)).

The decision on which the court of appeals relied, *Coalition*, 370 F.3d at 1190-1191, properly looked to these principles to hold that when a valid statute changes the requirements set forth in an agency regulation and there is no likelihood that the regulation will be en-

forced, the challenge to the regulation—or by extension here, a request for exemption from it—becomes moot. See Pet. App. 4a-5a. Petitioners cite, and we are aware of, no contrary authority.

b. The court of appeals likewise correctly applied that rule to this case. When all of FAA's orders were issued, the Age 60 Rule was still in effect.[3] But when the Act took effect, it "significantly alter[ed] the posture of this case." *Department of the Treasury* v. *Galioto*, 477 U.S. 556, 559 (1986) (statutory changes rendered action moot).

The Act provides that FAA's Age 60 Rule, which underlies all of the orders here, "shall cease to be effective" as of the date of enactment. 49 U.S.C. 44729(d). Because the orders being challenged denied exemptions from the Age 60 Rule, and because for some time now there has been no Age 60 Rule from which to exempt pilots, the orders themselves have no further effect. Stated otherwise, petitioners no longer have a "personal stake in the outcome of the lawsuit" because the relief they seek is an exemption from a rule that no longer exists. *Spencer*, 523 U.S. at 7 (internal quotation marks and citation omitted). The court of appeals thus correctly held that the petitions for review became moot with the passage of the Act.

2. Petitioners contend the court of appeals erred in concluding it could dismiss their petitions for review as moot "without consideration of the alleged unconstitutionality or invalidity of the [mooting] statute." Pet. i. That question is not presented here.

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[3] Indeed, most of the petitions for review were filed while the Age 60 Rule was still in effect. Only the petitions for review in Nos. 05-1507, 05-1524, and 08-1023 were filed after passage of the Act—on December 14, 2007, December 19, 2007, and January 22, 2008, respectively.

To be sure, petitioners raised constitutional objections in the court of appeals to the loss-of-seniority provision in Section 44729(e)(1)(B). But that provision was not the basis for the court of appeals' conclusion that the petitions for review had been mooted. Rather, it was Section 44729(d) that abrogated the Age 60 Rule (Pet. App. 3a), and as the court of appeals pointed out, "[p]etitioners do not * * * challenge the Act's abrogation of the Age 60 Rule." *Id.* at 4a.

The court of appeals accurately stated petitioners' position. At oral argument in the court of appeals, counsel for the government stated his understanding that petitioners did not take the "position * * * that the entire statute is unconstitutional." App., *infra*, 3a. Rather, counsel explained:

> MR. HIMMELFARB: Well, Your Honor, there's no challenge to the provision in the statute that says that the old rule shall cease to be in effect. * * * I don't think [petitioners'] attack on [Section 44729(e)(1)(B)] is going to put in question whether there's any problem with the portions of the statute that say as of the enactment date the old rule shall cease to exist.

Id. at 2a-3a.

When counsel for petitioners began his rebuttal, the court immediately asked whether this was correct. Counsel stated that petitioners "do not challenge the whole statute" but only "the discriminatory component of the statute." App., *infra*, 4a. In response to the court's next question, counsel made it even clearer that petitioners did not take issue with Section 44729(d)'s abrogation of the Age 60 Rule:

> THE COURT: So as far as the wipe out of the Age 60 Rule there's no attack on that, is that—
>
> MR. TURLEY: No, we take no position on that.

Ibid. This concession was confirmed in another exchange, where counsel reemphasized the limited reach of petitioners' challenge:

> THE COURT: * * * You contend the statute, everything in the statute is okay except for the seniority provision.
>
> MR. TURLEY: We're saying, it's certainly correct that we are *only* challenging those provisions that discriminate on the basis of age.
>
> THE COURT: Okay.

Ibid. (emphasis added).

Given petitioners' concession that they do not challenge the constitutionality of Section 44729(d), this case does not present a conflict (see Pet. 13-19) with decisions from other courts of appeals that have reviewed the constitutionality of new statutes. Petitioners cite several cases that they read to suggest that litigation is not moot unless the constitutionality of a new enactment is first established. See Pet. 14-17; *Continental Ill. Corp.* v. *Lewis*, 827 F.2d 1517, 1520 (11th Cir. 1987) ("This issue of mootness hinges, of course, on whether the amendment to § 664.02 is constitutional. If constitutional, then we agree with the defendant that the statute precludes effective relief and moots the case."), vacated, 494 U.S. 472 (1990). Assuming petitioners correctly characterize those cases, the decision below still is not to the contrary, because petitioners did not contest (and

thus conceded) that the Act's abrogation of the Age 60 Rule was constitutional.[4]

3. To the extent those cases from other courts of appeals instead stand for the proposition that a challenge to a superseded law can be recast as a challenge to the superseding law, the D.C. Circuit was correct to conclude that statutory limits on its jurisdiction precluded that approach here.

The court below exercised jurisdiction over petitions for review of FAA orders pursuant to 49 U.S.C. 46110(a), which grants jurisdiction to the courts of appeals in cases in which a person seeks "review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." Section 46110(a) confers jurisdiction on the court of appeals only to review an "order," which includes (as here) "an order issued by the Secretary of Transportation (or * * * the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator)." The court of appeals has "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order." 49 U.S.C. 46110(c).

But as the court of appeals correctly recognized below, Pet. App. 4a-5a, and in *Coalition*, 370 F.3d at 1191, nothing in Section 46110 authorizes it to address a free-standing constitutional challenge to a statutory provi-

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[4] Nor, for that matter, could petitioners fairly have argued that Section 44729(d)'s simple abrogation of the Age 60 Rule was invalid. "Congress, the source of [administrative] authority, can modify [administrative] rulings it considers improper." *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 596 (1983).

sion—at least not when the provision's validity *vel non* would not affect the court of appeals' decision to "affirm, amend, modify, or set aside any part of the order" of FAA under review, 49 U.S.C. 46110(c). Here, while Section 44729(e)(1)(B) may have a bearing on petitioners' seniority if they were rehired, it would have no bearing on the narrow question over which the court of appeals had jurisdiction, *i.e.*, how to dispose of a petition for review of an FAA order denying a request for exemption from a rule that no longer exists.[5]

Moreover, there is no apparent split of authority over whether a court of appeals has jurisdiction, on a petition for review of an agency order, to consider independent constitutional challenges to statutes not implicated by the order on review. Petitioners admit they "cannot find other cases with the identical case profile" to this case. Pet. 14 n.8. Similarly, the government knows of no case contrary to the decision below and *Coalition*. All the decisions cited by petitioners (see Pet. 14-17) arose in litigation in which the district court had general federal question jurisdiction under 28 U.S.C. 1331. That distinction makes all the difference, because unlike the court of appeals here, the district courts in those cases would

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[5] Petitioners also suggest that FAA has in fact granted exemptions from Section 44729(e)(1). See Pet. i, 25-33. They are mistaken. Although there has been some question over the interpretation of Section 44729(e)(1)(A) (which allows certain pilots over age 60 as of December 13, 2007, to serve in Part 121 covered operations without loss of seniority), FAA's authority to grant *exemptions* does not extend to the statutory requirements of Section 44729. See 49 U.S.C. 44701(f) (permitting exemptions only from *regulations* issued under certain statutory authorities). In all events, the court of appeals did not address any question concerning the availability of exemptions from Section 44729(e)(1), and that question presents no issue of broad significance that would warrant review by this Court at this time.

have broader latitude to take up a constitutional challenge to the superseding legislation just as they initially had jurisdiction to decide the constitutional challenge to the superseded law. Cf. *Diffenderfer*, 404 U.S. at 415 (vacating decision below as moot, but remanding "[b]ecause it is possible that appellants may wish to amend their complaint * * * to attack the newly enacted legislation").

4. Even if the threshold jurisdictional question petitioners raise were properly presented, review in this case would nonetheless be unwarranted because of the limited and diminishing importance of petitioners' underlying claim.

Petitioners' underlying claim is that Section 44729(e)(1)(B) impermissibly discriminates against specific pilots by depriving them of seniority on the basis of their age. Pet. App. 4a. By making certain pilots reeligible to serve in Part 121 covered operations, Congress created the potential for a clash of seniority between returning pilots over age 60, and younger pilots. Cf. p. 8, *supra*. To address that problem, Section 44729(e) sets up a temporary transitional regime for the narrow cohort of pilots born between December 13, 1942 and December 12, 1947. That is a small group relative to all commercial pilots; it is getting smaller as pilots become ineligible upon attaining age 65, see 49 U.S.C. 44729(a); and it will vanish in 2012. Moreover, petitioners do not even ask this Court to decide the underlying claim, but instead ask only that this Court determine that the court of appeals has jurisdiction to hear the claim—all of which counsels against review in this Court.

The court of appeals also expressed the view that, "if petitioners wish to challenge the constitutionality of

[Section 44729(e)(1)(B)] on its face, they should—assuming they can show Article III standing—file a complaint in the district court." Pet. App. 5a. The Attorney General has been notified that litigation between private parties in district court may draw the constitutionality of Section 44729(e)(1)(B) and (2) into question. Pl.'s Notice of Compliance with Fed. R. Civ. P. 5.1 at 1, *Emory* v. *United Air Lines*, No. 08-cv-2227-RBW (D.D.C. filed Mar. 27, 2009). Indeed, petitioners Emory and Sein in this Court are also plaintiffs in *Emory*. Those proceedings are an additional reason this Court's intervention is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2009

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1180

GRANT O. ADAMS, ET AL., PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.,
APPELLANTS [SIC]

Monday, Nov. 10, 2008

TRANSCRIPT

APPEARANCES:

ON BEHALF OF PETITIONERS:
Jonathan Turley, ESQ.

ON BEHALF OF RESPONDENTS:
Edward Himmelfarb, ESQ. (DOJ)

* * * * *

[13]

THE COURT: I'm sorry, I'm puzzled about your mootness argument. You said that a statute has mooted the prior procedure and the petitioners say the statute is unconstitutional. So, and we have to decide the constitutional question en route to deciding the mootness question?

MR. HIMMELFARB: Well, I think, Your Honor, in the Coalition of Airline Pilots Association of four years ago, this Court held that you do not do that because of the peculiar differences in jurisdiction.

THE COURT: Well, I don't think there they were claiming that once the statute was adopted the prior set of agency rules had any effect going forward, right?

MR. HIMMELFARB: I think that statute—

THE COURT: I think it was not contested that the statute stopped the effect of the agency rules. While here it is contested because the theory is that the statute unconstitutionally brought the Age 60 Rule to end.

MR. HIMMELFARB: Well, Your Honor, there's no challenge to the provision in the statute that says that the old rule shall cease to be in effect. The challenge is to the substantive conditions that are attached to having you know—that statute deals with two groups of pilots. One group of pilots are people under age 60 who are still employed by the air carriers. The other group is the people who have already [14] passed age 60 and therefore under the old rule are out and it deals with those two groups. Now with respect to the latter group, the people who are over 60 and are out, no longer employed

by air carriers, it says you can come back and fly till age 65 if one of the two conditions applies. And the first one is not particularly relevant to this case. The second condition is really where the constitutional challenge of the petitioners here goes. And I don't think that attack on that is going to put in question whether there's any problem with the portions of the statute that say as of the enactment date the old rule shall cease to exist. And in fact as Professor Turley has already suggested, they're claiming an affirmative reliance on portion of the statute, namely the—

THE COURT: It's not unusual to.

MR. HIMMELFARB: I beg your pardon?

THE COURT: It's not unusual to find one part of the statute that's helpful and one part of the statute that's not only helpful but invalid.

MR. HIMMELFARB: I was not suggesting that, Your Honor. What I was suggesting is I don't believe their position is that the entire statute is unconstitutional. They're focusing on a specific provision, namely the part that says—

THE COURT: Well, we'll ask Mr. Turley exactly what his position is, * * *

* * * * *

[22] * * * Thank you, Mr. Himmelfarb.

MR. HIMMELFARB: Okay, thank you, Your Honor.

THE COURT: So Mr. Turley did I (indiscernible) argument for you?

MR. TURLEY: No, Your Honor, we do not challenge the whole statute. In fact the rule governing all courts is to try to minimize the effect of a challenge on a statute and we do that in our brief. We challenge the discriminatory component of the statute.

THE COURT: You told me that.

MR. TURLEY: Yes, I mean—

THE COURT: So as far as the wipe out of the Age 60 Rule there's no attack on that, is that—

Mr. TURLEY: No, we take no position on that. If we go back to the Age—

THE COURT: Okay—

MR. TURLEY: We believe that whether this provision can be removed and is severable, the Court can make its decision. We do not ask for the entire statute to be struck down. We tried to minimize the impact on the statute as courts do. I would like to respond to a couple of things that my esteemed counsel has said.

THE COURT: Okay, so your first position is—and this is sort of looking ahead—you look forward to the statute. You contend the statute, everything in the statute [23] is okay except for the seniority provision.

MR. TURLEY: We're saying, it's certainly correct that we are only challenging those provisions that discriminate on the basis of age.

THE COURT: Okay.

* * * * *